2003

The State of Utah v. Christopher S. Kassuhn and Lisa Marie Manzanares : Brief of Appellant

Utah Court of Appeals

Wesley J. Howard; Salt Lake Legal Defender Assoc..
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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
CHRISTOPHER S. KASSUHN	:	Case No. 20030771-CA
and		
LISA MARIE MANZANARES,	:	Case No. 20030813-CA
Defendants/Appellants.	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Christopher S. Kassuhn on the charge of theft, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1953 as amended), and Lisa Marie Manzanares on the charges of theft, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1953 as amended) and unlawful possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37(a)-5 (1953 as amended), in the Third Judicial District Court, State of Utah, the Honorable Judith S. Atherton, Judge, presiding.

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NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a judgment of conviction for Christopher S. Kassuhn on the charges of theft, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1953 as amended), and Lisa Marie Manzanares on the charges of theft, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1953 as amended) and unlawful possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37(a)-5 (1953 as amended). Judgments are in Addendum. On August 14, 2003, both defendants plead guilty under State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988), reserving their right to appeal a motion to suppress denied by Judge Denise P. Lindberg on August 8, 2003. (K.R. 48 [1]) (Citations to the record will indicate

[1] The transcript from the motion to suppress hearing is filed under Kassuhn's name; therefore, there is no copy of it in the Manzanares record. However, the motion was made on behalf of both defendants.

M.R. for the Manzanares record and K.R. for Kassuhn record.)

This court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1953 as amended).

STATEMENT OF THE ISSUE

The following issue is presented for review by the court: Whether the trial court erred in denying defendant's motion to suppress where the officer detained defendants in a level-two stop without the requisite reasonable articulable suspicion.

STANDARD OF REVIEW AND PRESERVATION OF THE ARGUMENT

Standard of Review: "Whether an encounter with law enforcement officers constitutes a seizure under the Fourth Amendment . . . is a legal conclusion that we review for correctness." Salt Lake City v. Ray, 2000 UT App 55, ¶8, 998 P.2d 274 (quoting State v. Carter, 812 P.2d 460, 465 n.3 (Utah Ct. App. 1991)). Likewise, "Whether a particular set of facts gives rise to reasonable suspicion is a question of law, which is reviewed for correctness." State v. Markland, 2004 UT App 1, ¶2 (quoting State v. Chapman, 921 P.2d 446, 450 (Utah 1996)). Also, "The legal standard for reasonable suspicion . . . is highly fact dependent and the fact patterns are quite variable." Chapman, 921 P.2d at 450 (quoting State v. Pena, 869 P.2d 932 (Utah 1994)).

The issue is preserved on the record at M.R. 25-27, R. 20-23, 48:15.

The trial court ordered defendants' plea to be conditional on the right to appeal the motion to suppress pursuant to Sery, 758 P.2d 935. (K.R. 49:3, 57:4)

RELEVANT CONSTITUTIONAL PROVISIONS

The following constitutional provision will be determinative of the issue on appeal: U.S. Const. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On November 12, 2002, the stated charged Kassuhn with theft, a class B misdemeanor, and Manzanares with theft and unlawful possession of drug paraphernalia, both class B misdemeanors. (M.R. 2, K.R. 2).

On August 8, 2003, the defense, representing both defendants, moved to suppress evidence obtained in a warrantless search. (M.R. 12-20[2], K.R. 16-24). The Honorable Denise P. Lindberg held a hearing on the matter and denied the motion. (K.R. 48:17). Both defendants entered conditional Sery pleas on August 14, 2003 before the Honorable Judith S. Atherton, pleading guilty but reserving the right to appeal the motion to suppress evidence. (K.R. 49, 57). On September 11, 2003, both defendants filed timely notices of appeal. (M.R. 40, K.R. 31). The cases were consolidated by this Court pursuant to rule 3(b) of the Utah Rules of Appellate Procedure on November 14, 2003. (M.R. 55, K.R. 46).

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[2] The motion to suppress is repeated in the record at M.R. 21-29.

STATEMENT OF THE FACTS

On May 18, 2002, Deputy Robert L. Burton ("Officer Burton") of the Salt Lake County Sheriff's Department was dispatched on a call reporting a suspicious red vehicle parked on 8600 South east of Danish Road. (K.R. 48:1). The complainant, who is not identified, lived on the street and reported that three persons, whom she didn't recognize as belonging in the area, got out of the vehicle and walked westbound on Danish Road into the neighborhood on the west side. (K.R. 48:2). Just after midnight, Officer Burton responded to the area and located the vehicle. (K.R. 48:2). He did not locate anyone inside the vehicle or anyone standing near the vehicle. (K.R. 48:2). Then Officer Burton "ran the registration" and found that the vehicle was registered to Tiffinny Hadden ("Hadden") who lived in the northwest part of Salt Lake County. (K.R. 48:2). Once Officer Burton had identified the vehicle, he searched the surrounding area one more time, seeing no one, and then drove west across Danish Road into the neighborhood where the complainant said the individuals had walked. (K.R. 48:2-3). Officer Burton found no one walking the neighborhood so he drove back to the vehicle and again saw no one inside. (K.R. 48:3). As Officer Burton was leaving the area, he received another dispatch reporting that the same complainant had called back and said that the three individuals had returned, gotten inside the car and were lying down. (K.R. 48:3).

Officer Burton testified that as he approached the car, he "could see some people hiding inside the car." (K.R. 48:3). He radioed for backup and drew his weapon.

(K.R. 48:3). He ordered the occupants of the vehicle not to move. (K.R. 48:3). Then the driver, Hadden, opened her door. (K.R. 48:4). While Officer Burton held them at gun point, he had all the vehicle's occupants come to a seated position. (K.R. 19). After backup arrived, Officer Burton frisked the defendants, finding no weapons of any kind, and placed them in handcuffs. (K.R. 48:5).

Officer Burton then began to question the occupants of the car. (K.R. 48:5). Hadden told the police that they were in the area looking for a friend's house. (K.R. 48:5). Defendant Kassuhn told Officer Burton he wanted to talk with a friend about moving, and they were walking in the area to find the friend's house on Creek Road. (K.R. 19). Defendant Manzanares said "she was just along for the ride." (K.R. 48:5). When asked why they were hiding, Hadden indicated they were hiding because she did not have insurance on the vehicle. (K.R. 19). Kassuhn said he was hiding because Hadden had told him to hide and because he didn't want to be accused of anything. (K.R. 19). Manzanares said she was hiding because the others told her to hide. (K.R. 19).

Officer Burton then asked Hadden if he could search the vehicle and she consented. (K.R. 48:6). As Officer Burton was approaching the vehicle to search it, he saw a bundle of mail sticking out from under the driver's seat. (K.R. 48:6). Officer Burton bent down to look at the mail and saw that it belonged to an address in the neighborhood where the defendants had been walking. (K.R. 48:7). Officer Burton

asked the driver, Hadden, about the mail and she confessed that they were in the neighborhood stealing mail. (K.R. 48:9). Defendant Kassuhn admitted that he was present while the mail was being taken, but he didn't actually take the mail. (K.R. 48:9). Defendant Manzanares admitted to taking mail out of one of the mailboxes. (K.R. 48:9-10). All three suspects were arrested. (M.R. 3, K.R. 3). A search incident to arrest revealed drug paraphernalia in Manzanares's front coin pocket. (M.R. 3, K.R. 3).

SUMMARY OF THE ARGUMENT

Whether there was a seizure including a level-two detention is not at issue in this case. What is at issue is that Officer Burton failed to identify and articulate the reasonable suspicion necessary to physically detain the defendants.

A level-two detention is only justified if an officer has objective facts to support reasonable suspicion that the defendants were involved in criminal activity. Officer Burton had not observed any illegal activity before he detained the defendants at gun point. The state argued that Officer Burton had reasonable suspicion based on the lateness of the hour, the fact that the vehicle was not registered to a home in the neighborhood, and the fact that the occupants of the vehicle were lying down inside. Under the totality of the circumstances test, these facts do no rise to the level of reasonable suspicion of criminal wrongdoing. Therefore, the level-two stop was unlawful because it was not supported by articulable reasonable suspicion.

Alternatively, if this Court finds that Officer Burton had reasonable suspicion to initially stop the defendants, he exceeded the scope of this detention when he asked to search the car. Officer Burton found no evidence of wrongdoing after he had searched each individual in the car and was therefore required to release them. Any further investigation was unlawful. For these reasons, the trial court erred denying the motion to suppress.

ARGUMENT

A. OFFICER BURTON CONDUCTED A LEVEL-TWO DETENTION OF THE DEFENDANTS, WHICH WAS NOT SUPPORTED BY REASONABLE SUSPICION AND THEREFORE VIOLATED THE FOURTH AMENDMENT.

The constitutional rights of Kassuhn and Manzanares against unreasonable search and seizures were violated when Officer Burton, without any indication of criminal activity, held them at gun point, told them not to move, removed them from the vehicle, and handcuffed them. "The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Terry v. Ohio, 392 U.S. 1, 8 (1968) (citation omitted). To protect this fundamental right, police officers must limit their detention of individuals to cases where "the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." Chapman, 921 P.2d at 450 (quoting Pena, 869 P.2d at 940.

1. The facts of this case support a finding that police seized Kassuhn and Manzanares in a level-two detention.

The trial court did not specifically find that Officer Burton conducted a level-two stop; however, the court's finding of reasonable suspicion assumed it was a level-two stop, and case law supports such a conclusion. A level-two detention is one of three types of encounters which the constitution permits between officers and citizens. State v. Topanotes, 2000 UT App 311, ¶5, 14 P.3d 695, 696. This Court describes the three levels of detention as follows:

> (1) an officer may approach a citizen at anytime and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last not longer than is necessary to effectuate the purpose of the stop;" (3) an officer may arrest a suspect if the officer has probable cause to believe an offense as been committed or is being committed.

Id. (quoting Salt Lake City v. Ray, 2000 UT App 55, ¶8, 998 P.2d 274)). A level-one detention is a consensual encounter with police, while a level-two encounter constitutes a seizure. State v. Struhs, 941 P.2d 1225, 1227 (Utah Ct. App. 1997). A level-one encounter becomes a level-two stop when "a reasonable person, in view of all the circumstances, would believe he or she is not free to leave." Ray, 2000 UT App 55, ¶11 (quoting State v. Jackson, 805 P.2d 765, 767 (Utah Ct. App. 1990)). Circumstances which Utah courts have held to be seizures include the display of a weapon by a police officer, or the use of language that indicates compliance with the request is compelled. See id. (quoting State v. Patefield, 927 P.2d 655, 659 (Utah Ct. App. 1996)).

The Defendants' encounter with police was, at the very least, a level-two detention because they were held at gun point and ordered not to leave. (K.R. 48:3-4). A reasonable person under the circumstances would not believe that he or she is free to leave. Id.; see also State v. Hansen, 2002 UT 125, ¶41, 63 P.3d 650; State v. Trujillo, 739 P.2d 85, 87 (Utah App. 1987). Kassuhn and Manzanares clearly would not have felt free to disregard the order of the police not to move while they were inside the car. Even more indicative that this was not a consensual encounter is the fact that defendants were handcuffed after they were removed from the car. Officer Burton held the defendants under gun point and then search and handcuffed them; therefore, the encounter was a level-two detention, and Kassuhn and Manzanares were seized under the meaning of the Fourth Amendment.

2. The trial court erred in finding that Officer Burton had reasonable suspicion to detain the defendants.

Once the court has determined that a person was seized within the meaning of the Fourth Amendment, the issue becomes whether the seizure was constitutionally permissible. "A level two stop must be supported by reasonable suspicion or it violates the Fourth Amendment to the United States Constitution." Ray, 2000 UT App 55, ¶18 (quoting State v. Bean, 869 P.2d 984, 988 (Utah Ct. App. 1994)). To determine whether a seizure is constitutionally lawful, courts first must look at "whether the officer's action was 'justified at its inception.'" Chapman, 921 P.2d at 450 (quoting Terry, 392 U.S. at 9). If the initial stop was justified, the court then looks at whether the detention was

"reasonably related in scope to the circumstances that justified the interference in the first place." Id. In this case, the state failed to prove the requisite reasonable suspicion for the initial detention and the later search.

a. *There was no reasonable suspicion to detain Kassuhn and Manzanares at the inception of the stop.*

To be justified at its inception, an officer must have "an 'articulable suspicion' that the person has committed or is about to commit a crime." Markland, 2004 UT App 1, ¶3 (quoting Ray, 2000 UT App 55, ¶10). In determining whether reasonable suspicion existed at the time of the stop, the court must look at the "totality of the circumstances" and "determine if there was an objective basis for suspecting criminal activity." Id., ¶4 (quoting State v. Beach, 2002 UT App 153, ¶8, 47 P.3d 932). An objective basis is determined by "specific, articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude [the defendants] had committed or [were] about to commit a crime." Trujillo, 739 P.2d at 88. Furthermore, "in determining whether this objective standard has been met, the focus necessarily centers upon the facts known to the officer immediately before the stop." Ray, 2000 UT App 55, ¶18 (quoting State v. Friesen, 1999 UT App 262, ¶12, 988 P.2d 7).

As stated above, the seizure took place as soon as Officer Burton used a "show of authority" to "restrict[] the liberty of a person," or at the moment Officer Burton drew his gun and ordered the occupants of the vehicle not to move. Trujillo, 739 P.2d at 87. Therefore, Officer Burton must have known facts before this point that would establish

reasonable suspicion. These facts did not come from the information received from dispatch because the informant call only claimed that people she didn't recognize got out of a vehicle and were walking around. (K.R. 48:2). The neighbor who called police was describing innocent behavior. The people getting out of the car could have been lost while looking for a friend's house, simply stopping to walk around, or any number of completely innocent behaviors. Therefore, the facts supporting reasonable suspicion must come from Officer Burton's own observations after he arrived at the scene.

At the motion to suppress hearing, Officer Burton stated that he felt he had reasonable suspicion of criminal activity when he first ordered the defendants not to move even though he had not observed any illegal activity. (K.R. 48:4). Specifically, on cross-examination, Officer Burton testified as follows:

> Q: Then, even though you didn't observe any illegal activity whatsoever you ordered the people, the individuals in the car not to move?
>
> A: Yes
>
> Q: You called for backup
>
> A: Yes
>
> Q: And then still without any indication that there was any illegal activity you ordered backup to come, and he appeared on the scene and he was in another vehicle.
>
> A: Yes
>
> Q: You had your gun in your arm?
> A: Yes

Q: You cuffed the individuals?

A: Yes

Q: And you frisked them?

A: Yes

Q: All without any indication of any illegal activity.

A: Suspicious activity

(K.R. 48:12).

In a case just decided by this Court, Markland, the officer similarly had no indication that criminal activity was afoot. 2004 UT App 1, ¶7. In Markland, the deputy responded to a call from dispatch at 3:00 a.m., just as Officer Burton did in this case. Id., ¶5. The dispatch stated that the caller had heard screaming near an apartment complex. Id. When the police arrived, Markland was the only person in sight, and he was walking down a dark street, towards a dead end, carrying two cloth bags. Id. The deputy then stopped Markland, asked if had heard any screaming, and took his identification to run a warrants check. Id. This Court found that these facts did not constitute reasonable suspicion because the officers "did not observe, have knowledge of, or have suspicions about any crime that had been committed or was about to be committed, let alone any crime Defendant had committed or was about to commit." Id., ¶8.

The facts of Markland are very similar to this case. First, the informant tip did not give any information about a crime that was being committed. Second, when Officer

Burton arrived, there was no indication that a crime was being committed by Defendants. Instead of walking down a dark dead-end road, Kassuhn and Manzanares were lying down in the car. (K.R. 48:12). And just as in Markland, these facts "were at least as consistent with lawful behavior as with the commission of a crime." Markland, 2004 UT App 1, ¶7 (quoting Ray, 2000 UT App 55, ¶19).

Even though Officer Burton knew of no facts which indicated that a crime was being committed, he claimed to have reasonable suspicion to detain the defendants in a level-two stop because there was "suspicious activity." (K.R. 48-12). Specifically, Officer Burton stated he had articulable suspicion "[d]ue to the fact of the time of the hour; the vehicle didn't belong in the immediate area and that the parties that were inside the vehicle were trying to hide themselves from view from anyone outside the vehicle." (K.R. 48:4). The trial court found that this was a valid basis for reasonable suspicion. (K.R. 48:16). However, the trial court erred because none of these facts support reasonable suspicion that Defendants were involved in criminal activity, as will be discussed below. The first two facts, lateness of the hour and the car not belonging in the neighborhood, are directly addressed by Utah case law, which states they are not enough to establish reasonable suspicion. See e.g. State v. Carpena, 714 P.2d 674, 675 (lateness of the hour and fact that a car, which had Arizona plates, did not belong in neighborhood, was not enough to establish reasonable suspicion). The third fact, that Defendants were lying down in the car, does not raise reasonable suspicion by itself.

There are three Utah cases which have held that the fact an individual is out at a late hour does not support reasonable suspicion that the person is involved in criminal conduct. First, in State v. Swanigan, at approximately 1:40 a.m., an officer stopped two people walking through a neighborhood based on a description given by another officer who had seen two individuals walking in the area where a recent burglary had occurred. 699 P.2d 718 (Utah 1985). The officer did not see the two individuals commit any illegal activity. Id. at 719. The Utah Supreme Court held the stop unconstitutional because "the stop was based on mere hunch rather than the constitutionally mandated 'reasonable suspicion'" Id.

Second, in Carpena, at 3:00 a.m., an officer patrolling a neighborhood where recent burglaries had occurred observed a slow moving car with Arizona license plates. 714 P.2d at 675. The officer did not observe any criminal offense. Id. The officer pulled the car over and found marijuana in the trunk. Id. The Utah Supreme Court held this was an illegal stop because the stop "was based merely on the fact that a car with out-of-state license plates was moving slowly through a neighborhood late at night." Id. The Court said these circumstances gave the officer "no objective facts on which to base reasonable suspicion." Id.

Third, in Trujillo, at approximately 3:30 a.m., an officer observed Trujillo and two others walking and looking into business windows on State Street. 739 P.2d at 86. Trujillo was carrying a knapsack which the officer thought he was trying to conceal. Id.

Without observing any criminal activity, the officer stopped the group. Id. This Court found that the "initial decision to stop was based merely on the lateness of the hour and the high crime area." Id. at 89. Applying Swanigan and Carpena, this Court held that these circumstances "[did] not support a reasonable suspicion that Trujillo was involved in criminal conduct." Id.

These cases, Carpena, Swanigan and Trujillo, "suggest that traveling in a lawful manner at a late hour . . . is not sufficient to support a reasonable suspicion that the suspect is involved in criminal conduct." State v. Baumgaertel, 762 P.2d 2, 4 (Utah Ct. App. 1988). Just as in these three cases, Officer Burton did not observe any illegal activity; yet, he felt he had reasonable suspicion, in part, due to the "time of the hour." (K.R. 48:4). However, whether it is 1:30, 3:00, or 3:30 in the morning, this Court has consistently held that walking or driving around a neighborhood in the middle of the night does not give the police reasonable suspicion to conduct a level-two stop. Similarly, Officer Burton did not have reasonable suspicion that the defendants in this case were committing a crime because they were walking around a neighborhood just after midnight. (K.R. 48:2).

Next, Officer Burton claimed that because he checked the license plate of the car which belonged to the defendants and it did not belong to the neighborhood they were in, this supported his reasonable suspicion they were involved in criminal activity. (K.R. 48:4). The trial court agreed; however, Utah case law does not support this

conclusion. In Carpena, the Supreme Court specifically held that a stop based "merely on the fact that a car with out-of-state license plates is moving slowing through a neighborhood late at night" does not establish reasonable suspicion. 714 P.2d at 675. The facts of this case are very similar. Late at night, Officer Burton was investigating a car which was not registered to an address in the neighborhood. (K.R. 48:2). But the officer in Carpena had even more facts which support reasonable suspicion because the car was in a neighborhood where many burglaries had recently occurred.[3] Carpena at 675. In this case, there was no indication that a crime had recently occurred or that this was a high-crime area.

Two other Utah cases also held that an out-of-state license plate did not give the officer reasonable suspicion to make an investigatory stop. In State v. Sierra, an officer pulled over a car based on the fact it had New York plates and the driver's "suspicious nature and the way Sierra reacted when he saw me." 754 P.2d 972, 976 (Utah App. Ct. 1988). This Court held that "the totality of the circumstances . . . [did] not support a reasonable suspicion that Sierra was engaged in or about to be engaged in criminal activity." Id. Following Sierra, this Court in State v. Baird, similarly held that an officer did not observe facts which would support reasonable suspicion, when he observed a car with Arizona license plates and said "something struck him funny about it." 763 P.2d

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[3] "The fact that the stop occurred in a "high crime area" [is] among the relevant contextual considerations in a Terry analysis." Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

1214 (Utah Ct. App. 1988). Like these cases, Officer Burton's finding that the car Defendants were in was not registered to the neighborhood does not support a reasonable suspicion that they were involved in criminal activity.

As shown above, Officer Burton could not establish reasonable suspicion merely on the lateness of the hour and the fact that the car was not registered to the neighborhood. This leaves the Court with only the fact that the parties were lying down in the car and seemed to be "hiding" to establish the requisite reasonable suspicion necessary to support a level-two stop. While a fact may in combination with other indicators of crime establish reasonable suspicion, lying down in a car late at night, when combined with the purely innocent behavior of being in a neighborhood one does not live at a late hour, it is not enough to establish reasonable suspicion.

At the motion to suppress hearing, Officer Burton stated that he made an assumption that when he saw the defendants lying down on the floorboard of the car, they were hiding. (K.R. 48:11). The Utah Supreme Court recently clarified that a subjective belief can be factored into the totality of the circumstances, but a detention requiring reasonable suspicion cannot be "validated or invalidated based solely on a subjective belief because no one factor alone is determinative of reasonableness." State v. Warren, 2003 UT 36, ¶21, 78 P.3d 590. Therefore, Officer Burton's subjective belief that Defendants were hiding can be a factor in finding reasonable suspicion but it is not determinative.

Lying down in a car is not illegal. Such actions are "at least as consistent with lawful behavior as with the commission of a crime." Markland, 2004 UT App 1, ¶7. There could be any number of innocent reasons to be on the floor of your car. A person could be looking for something, or trying to get an object that slipped under the seat. While hiding in a vehicle may appear suspicious, it is not *per se* indicative of criminal behavior. In fact, both defendants told Officer Burton they were hiding because the driver told them to, not because they were evading the officer. (K.R. 19).

Lying in the car when looked at in the 'totality of circumstance' was simply not enough to create reasonable suspicion. Officer Burton had no indication of criminal activity; therefore, a finding of reasonable suspicion would rely solely on the fact that the defendants were hiding in the car. However, as stated above, "an officer's subjective belief alone is insufficient to validate or invalidate" a level-two detention. Warren, 2003 UT 36, ¶20. For this reason, other jurisdictions which have found reasonable suspicion in cases where the defendants were found hiding always relied on other pertinent factors as well. See State v. Wilson, 2002 WI App 165, ¶3, 647 N.W.2d 467 (finding reasonable suspicion when defendant was found hiding under a parked car because he had recently run from a traffic stop).

For example, in Crabtree v. State, an officer received an anonymous call that a group of people were standing by a car with a loud stereo. 762 N.E.2d 241, 244 (Ind. Ct. App. 2002). When the officer arrived at the scene, he saw a man crouching behind a

parked car and straining to look over the edge. Id. The Indiana court found reasonable suspicion because along with the act of apparently hiding, it was a high crime area and the defendant had turned down his stereo when he saw the police officer. Id. at 247. Officer Burton did not have additional facts, like being in a high crime area, which would help make these circumstances establish reasonable suspicion.

Furthermore, lying down in a car can be distinguished from running from an officer, an evasive behavior which the U.S. Supreme Court found to create reasonable suspicion. In Illinois v. Wardlow, the officer was assisting in a special operations investigation in an area know for heavy narcotics trafficking. 528 U.S. 119, 121 (2000). As he approached the area, the officer saw the defendant run from the scene. Id. The Supreme Court found that fleeing combined with being present in such a high crime area created reasonable suspicion. Id. at 126. The Court stated, "[h]eadlong flight–wherever it occurs–is the consummate act of evasion." Id. at 125. It is hard to mistake running from police officers with any other intent but to evade the officer; therefore, the risk to Fourth Amendment rights is minimal. However, lying in a car can have many innocent explanations. A finding of reasonable suspicion which rests only on the fact the defendants were lying in a car could lead to innocent people being deprived of their constitutional rights.

Officer Burton illegally seized the defendants because there were no facts which indicated a crime had recently occurred and he did not observe any actions which would

give him reasonable suspicion to believe the defendants were involved in criminal activity. The totality of circumstances, lying down in a car, late at night in a neighborhood where one does not live, do not rise to the level of reasonable suspicion because there was no indication that Defendants were committing a crime. Therefore, the stop was invalid and the evidence obtained from the search should be suppressed.

b. *Even if the initial detention is found to be lawful, Officer Burton exceeded the scope of the stop when he asked the driver if he could search the car.*

Assuming *arguendo* that this Court finds that Officer Burton did have the necessary reasonable suspicion to justify the initial stop, the Court next must inquire whether Officer Burton exceeded the scope of the justification for the detention. "[O]nce a stop is made, the detention 'must be temporary and last not longer than is necessary to effectuate the purpose of the stop.'" Chapman, 921 P.2d at 452 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)). Therefore, once the purpose of the stop is completed, the officer must allow the person to leave. Hansen, 2002 UT 125, ¶31. "Investigative questioning that further detains the [person] must be supported by reasonable suspicion of more serious criminal activity." State v. Lopez, 873 P.2d 1127, 1133 (Utah 1994).

Officer Burton testified that the defendants were behaving suspiciously because they were hiding in the car. (K.R. 48:11). Officer Burton then pulled his gun, called for backup, had all three people exit the vehicle, searched them, and then handcuffed them. (K.R. 48:4-5). Officer Burton also testified that he did not observe any illegal activity.

(K.R. 48:11). Hadden, the driver, told Officer Burton that she was hiding because she did not have car insurance. (M.R. 28, K.R. 23). The defendants gave consistent stories. (M.R. 28, K.R. 23). At this point, Officer Burton still could not point to any articulable fact of illegal activity. The purpose of the stop was complete. Asking the driver if he could search the car exceeded the scope of the detention because there was no indication of criminal activity.

State v. Bissegger illustrates this point. 2003 UT App 256, 76 P.3d 178. In this case, Bissegger was pulled over by police for having an expired registration. Id., ¶2. The officer smelled alcohol coming from Bissengger's breath, but saw no other signs of impairment. Id. Then the officer asked Bissegger to take a field sobriety test, which he passed. Id. The officer then asked Bissegger if he had any open containers of alcohol in the car; he said no. Id. Then the officer asked for consent to search the car. Id. This Court held that "Officer Wolken exceeded the scope of the detention when he requested permission to search the car." Id., ¶20.

Similarly, Officer Burton exceeded the scope of his detention when he asked permission to search the car. In Bissegger, the officer suspected that the driver had been drinking. Once he administered the field sobriety test and the driver passed it, the purpose for the initial stop was complete. In this case, Officer Burton suspected the defendants were engaged in some kind criminal behavior but did not know exactly what. After the officer had the defendants exit the car and questioned them and still found no

indication of criminal activity, the purpose of the stop was complete. Any further detention was unlawful.

At the motion to suppress hearing, the state argued that the plain view exception could apply because the mail was visible from the outside of the car. "A seizure is valid under the plain view doctrine if (1) the officer is lawfully present, (2) the item is in plain view, (3) the item is clearly incriminating." State v. McArthur, 2000 UT App 23, ¶22, 996 P.2d 555. The plain view doctrine does not apply in this case for two reasons. First, when Officer Burton first saw the mail, he was not "lawfully present" because he had already asked for consent to search the car which exceeded the scope of the detention. Second, seeing mail in a car with an address belonging to the neighborhood where the car was located is not "clearly incriminating." The mail could have belonged to a friend of the driver, and many people might put their mail under their seat to avoid losing it while driving.

An officer's suspicions must be based on particularized, objective facts, and they must support the defendant's involvement in criminal activity. Terry, 392 U.S. at 20-21, 30. Officer Burton did not find any indication of criminal activity after his initial questioning of the defendants; therefore, he should have released them. Any further detention exceeded the scope; therefore, the defendant's respectfully ask this Court to reverse the trial court's ruling on the motion to suppress.

B. THE EVIDENCE OBTAINED AS A RESULT OF THE UNLAWFUL DETENTION OF DEFENDANTS SHOULD BE SUPPRESSED.

The exclusionary rule acts to suppress evidence illegally obtained. "If a seizure occurs and the police are unable to point to the specific and articulable facts that justified that seizure, the seizure violates the fourth amendment of the United States Constitution, and evidence obtained as a result of the illegal seizure must be excluded." State v. Ramirez, 817 P.2d 774, 786 (Utah 1991) (quoting Terry, 396 U.S. at 15).

Officer Burton illegally seized the defendants in this case because he did not identify objective facts to support reasonable suspicion that Kassuhn and Manzanares had engaged in any criminal activity. (See supra subpoints 2.a and 2.b, above.) During this unlawful detention, Officer Burton searched the car, discovering evidence as a direct result of the unlawful detention. Under the exclusionary rule, this evidence must be barred from trial. See e.g. Wong Sun v. U.S., 371 U.S. 471, 485-86 (1963).

CONCLUSION

The officer in this case conducted an unlawful level-two detention, because he failed to articulate reasonable suspicion that the defendants were committing or about to commit a crime. This detention violated the constitutional rights of the defendants, and any evidence discovered as a result thereof should be suppressed. Based on the foregoing, the defendants respectfully request this Court to reverse the trial court order on the motion to suppress.

RESPECTFULLY SUBMITTED this 22nd day of March, 2004.

WESLEY J. HOWARD
Attorney for Defendants/Appellants

CERTIFICATE OF DELIVERY

I, WESLEY J. HOWARD, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the District Attorney's Office, 2001 South State Street, S3700, Salt Lake City, Utah 84190-1200, this 22nd day of March, 2004.

WESLEY J. HOWARD

DELIVERED to the Utah Court of Appeals and the District Attorney's Office as indicated above this _____ day of March, 2004.

ADDENDUM

3RD DISTRICT COURT - SANDY COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES CHANGE OF PLEA SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 021400560 MO
CHRISTOPHER S KASSUHN, Defendant.	:	Judge: JUDITH S ATHERTON Date: August 14, 2003

PRESENT
Clerk: vickielc
Prosecutor: GARDNER, BRIAN J
Defendant
Defendant's Attorney(s): HOWARD, WESLEY J

DEFENDANT INFORMATION
Date of birth: August 6, 1979
Audio
Tape Number: 03-230 Tape Count: 7000

CHARGES

2. THEFT - Class B Misdemeanor
Plea: Guilty - Disposition: 08/14/2003 Guilty

The Information is read.
Court advises defendant of rights and penalties.
Defendant waives time for sentence.

SENTENCE JAIL

Based on the defendant's conviction of THEFT a Class B Misdemeanor, the defendant is sentenced to a term of 45 day(s) The total time suspended for this charge is 41 day(s).

Credit is granted for 4 day(s) previously served.

Case No: 021400560
Date: Aug 14, 2003

SENTENCE FINE

Charge # 2
Fine: $400.
Suspended: $0.00
Surcharge: $183.78
Due: $400.00

Total Fine: $400.00
Total Suspended: $0
Total Surcharge: $183.78
Total Principal Due: $400.00
Plus Interest

SENTENCE TRUST

The defendant is to pay the following:
Attorney Fees: Amount: $150.00 Plus Interest
Pay in behalf of: SALT LAKE COUNTY TREASURER

SCHEDULED TIMEPAY

The following cases are on timepay 021400560.
The defendant is to pay $25.00 monthly on the 15th.
The number of payments scheduled is 22.
The first payment is due on 09/15/2003 the final payment of $18.59 is due on 07/15/2005. The final payment may vary based on interest.

ORDER OF PROBATION

The defendant is placed on probation for 12 month(s).
Defendant to serve 4 day(s) jail.

Defendant is to pay a fine of 400.00 which includes the surcharge.
Interest may increase the final amount due.
Pay fine to The Court.

Case No: 021400560
Date: Aug 14, 2003

PROBATION CONDITIONS

The defendant have no further violations.
The defendant to have no contact with the co-defendant in this case.
The court will continue probation till all fines, and attorney fees are paid in full.

Dated this 14 day of Aug, 2003.

JUDITH S ATHERTON
District Court Judge
By
STAMP USED AT DIRECTION OF JUDGE

STATE OF UTAH
3RD DISTRICT COURT
SANDY

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3RD DISTRICT COURT - SANDY COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES CHANGE OF PLEA SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 021400561 MO
LISA MARIE MANZANARES, Defendant.	:	Judge: JUDITH S ATHERTON Date: August 14, 2003

PRESENT
Clerk: vickielc
Prosecutor: GARDNER, BRIAN J
Defendant
Defendant's Attorney(s): HOWARD, WESLEY J

DEFENDANT INFORMATION
Date of birth: December 18, 1983
Audio
Tape Number: 03-230 Tape Count: 2680

CHARGES

3. THEFT - Class B Misdemeanor
Plea: Guilty - Disposition: 08/14/2003 Guilty
4. POSSESSION OF DRUG PARAPHERNALIA - Class B Misdemeanor
Plea: Guilty - Disposition: 08/14/2003 Guilty

The Information is read.
Court advises defendant of rights and penalties.
Defendant waives time for sentence.

SENTENCE JAIL

Based on the defendant's conviction of THEFT a Class B Misdemeanor, the defendant is sentenced to a term of 45 day(s)

Credit is granted for 45 day(s) previously served.

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Case No: 021400561
Date: Aug 14, 2003

SENTENCE JAIL SUSPENDED NOTE

THE COURT ORDERS DEFENDANT TO HAVE CREDIT FOR TIME SERVED AND CLOSE CASE.

Dated this 1st day of Aug, 2003.

JUDITH S ATHERTON
By District Court Judge
STAMP USED AT DIRECTION OF JUDGE

STATE OF UTAH